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INDIANA COAL COUNCIL, INC.
150 West Market Street, Suite 400
Indianapolis, IN 46204
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July 15, 2013

Via Electronic Mail

Ms. Tinka Hyde
Director, Water Division
ATTN: Indiana's 303(d) list
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: Proposed Listing of Additional Waters To Be Included on Indiana's 2010 List of Impaired Waters Under Section 303(d) of the Clean Water Act

Dear Director Hyde:

These comments are submitted on behalf of the Indiana Coal Council, Inc. ("ICC") relating to the U.S. Environmental Protection Agency's ("EPA") proposed decision identifying water quality limited segments and associated pollutants in Indiana to be listed pursuant to the Clean Water Act Section 303(d)(2), notice published at 78 Fed. Reg. 35,929 (Jun. 14, 2013). The ICC is a trade association representing Indiana coal producers and related entities. The Association was formed to foster, promote, and defend the interests of all business entities related to the coal industry. Our membership will be affected by this rulemaking.

On May 8, 2013, EPA partially approved and partially disapproved the 2010 Indiana 303(d) list submittal (the "2010 Indiana 303(d) list"). The Federal Register notice provides for roughly a 30-day comment period, which violates the spirit of President Clinton's Executive Order 12866 and President Obama's Executive Order 13563 that each call for meaningful public engagement and comment periods of 60 days.¹ As a threshold matter, the ICC requests that EPA extend the public comment period by at least 30 additional days. In the event EPA decides to honor this request, and in turn the directives of the Clinton and Obama Executive Orders, the ICC reserves the right to supplement the comments submitted herein because 30 days is not enough time to sufficiently address the legal and technical complexities that are linked to Indiana's 303(d) list.

EPA's proposed decision disapproves Indiana's decision not to list a series of waters for certain metal impairments (impairments and waters listed in Table 12 of Appendix A1 in EPA's May 8, 2013 Decision Document). Prior to EPA's proposed decision, the Indiana Department of

¹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

Alcoa Generating Inc., Warrick ♦ Alliance Coal, LLC ♦ Black Panther Mining, LLC ♦ Five Star Mining, Inc. ♦ Jarvis Coal, LLC
Natural Resource Partners, L.P. ♦ Peabody Energy ♦ Peabody Midwest Mining, LLC ♦ Solar Sources, Inc. ♦ Sunrise Coal, LLC
Templeton Coal Company ♦ Triad Mining, Inc. ♦ Vectren Fuels, Inc. ♦ Vigo Coal Company

Environmental Management ("IDEM") had correctly revised its approach in two assessment situations. IDEM's revisions remedied certain legal and technical deficiencies that had existed in its draft Indiana 303(d) list. In EPA's proposed decision, it disagrees with IDEM's revised approach in these two assessment situations. As a result, EPA's proposed decision with respect to its disapproval is legally and technically flawed. Members of the ICC would be directly and adversely impacted if these deficiencies are not corrected. Unwarranted 303(d) listings could result in job losses. The ICC questions how EPA is able to justify the risk of wasted State resources and job losses through the use of poor science when the State intends to conduct the proper studies in the future. For reasons including, but not limited to, the issues described in further detail below, the ICC requests that EPA make appropriate revisions to its proposed decision.

1. Using derived criteria as a basis for listing waters as impaired.

The Indiana Water Pollution Control Board ("WPCB") formally promulgates Indiana water quality standards as rules. In fact, the WPCB has exclusive authority to adopt rules governing the water program, and IDEM has no statutory authority to promulgate such rules.² Indiana law mandates that these rules cannot be adopted until all due process requirements have been complied with and properly met. Such due process requirements include, but are not limited to, two 30-day public comment periods, a duty to evaluate and respond to comments, and a rulemaking hearing before the WPCB. This is the full rulemaking process that is prescribed by the pertinent provisions of IC 4-22-2, IC 13-14-8 and IC 13-14-9.³

EPA's Decision Document relating to the use of derived criteria as a basis for listing waters as impaired contravenes Indiana law in two respects. First, the iron and aluminum values used by EPA to partially disapprove the 2010 Indiana 303(d) list, resulting in proposed additions of waters and associated metal impairments, are not water quality standards that have been promulgated by the WPCB. Accordingly, neither adequate due process nor proper public participation has been provided. EPA's belief that derived criteria procedures are "applicable

² IC 13-18-3-1; See Van Allen v. State, 467 N.E.2d 1210 (Ind. Ct. App. 1984) (holding administrative agencies are creatures of statute and only possess those powers the General Assembly gives them).

³ By letter dated February 26, 2010, the ICC provided comments to IDEM on its draft 2010 303(d) list. Included within those comments was extensive analysis on why derived criteria must be promulgated under Indiana law. A portion of that analysis is set forth herein. IC 4-22-2-3(b) provides: "'Rule' means the whole or any part of an agency statement of general applicability that: (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency." Derived criteria meet the definition of a rule. See, e.g., Indiana-Kentucky Elec. Corp. v. Commissioner, 820 N.E.2d 771, 780 (Ind. Ct. App. 2005) (IDEM ambient air quality monitor requirement meets "rule" definitional requirements).

Rulemaking "embraces [an] element of generality, operating upon a class of individuals ... additionally, exercise of administrative rule making power looks to the future." Blinzinger v. Americana Healthcare Corp., 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984) (holding Dept. of Public Work's action was "in the nature of a rule, and because it was not promulgated in compliance with statutory requirements, it is void and without effect."). But in proceeding as it did, IDEM and the WPCB disregarded mandatory due process requirements prescribed by IC 4-22-2-23(b), 4-22-2-24 (4-22-2-24(d)), 4-22-2-25, 4-22-2-26, 4-22-2-27, 4-22-2-28, 4-22-2-31, 4-22-2-33, 13-4-9-2, and 13-14-9-4.2. By revising its approach to derived criteria, IDEM corrected the flaws in its 303(d) listing process. With its proposed additions of assessment unit impairments to the 303(d) list, EPA has now caused these due process and public participation deficiency issues to resurface.

water quality standards” per 40 C.F.R. § 131.21(c) and (d),⁴ misconstrues the context of the federal regulation and the meaning of the phrase. The water quality criteria derived under 327 IAC 2-1-8.1 through 8.9 have not been afforded full due process and public participation protections unless, and until, they are incorporated into the minimum water quality standards set forth in 327 IAC 2-1-6.⁵

Second, EPA sets forth its belief that there has been adequate notice of, and opportunity for public comment due to the fact that the public: (a) had the opportunity to comment on the derived criteria methodology IDEM proposed to adopt into the State’s water quality standards; (b) had the opportunity to comment on the use of derived criteria when the State noticed its proposed 303(d) list of impaired waters; and, (c) will have the additional opportunity to comment when the State develops TMDLs for those impaired waters.⁶ Further, EPA states that individual permittees will have additional opportunity to comment and challenge any proposed effluent limits based upon the derived criteria.⁷

The ICC does agree with EPA that these are public comment opportunities. Further, the ICC disagrees with EPA that these opportunities are adequate with respect to the derived criteria issue. In each of the four cited comment opportunity examples, EPA fails to acknowledge that Indiana law requires two public comment periods specific to the promulgation of water quality standards as rules (followed by evaluation/response to comments, and a rulemaking hearing before the WPCB). This process simply has not occurred with regard to iron and aluminum in the state of Indiana. Therefore, any proposed addition to the 2010 Indiana 303(d) list citing to iron or aluminum as the cause of impairment is unlawful.⁸ Derived criteria should not be used to establish TMDLs until they have undergone the full rulemaking process and been incorporated into the general water quality standards in 327 IAC 2-1-6.

2. Using total recoverable metals as a basis for listing waters as impaired.

IDEM has the authority to base 303(d) listings on dissolved rather than total recoverable metals. Pursuant to 40 C.F.R. 130.7(b)(6)(iii), the documentation accompanying IDEM’s 2010 303(d) list included a rationale for its decision not to use total recoverable metals. Now, EPA appears to frame the issue by asserting the IDEM approach is based on dissolved metals data being preferable.⁹ What is striking here is that EPA expressly agrees the dissolved metal fraction “more closely approximates” the bioavailable fraction of metal in the water column.¹⁰ The question becomes, where is the line drawn on using existing and readily available data and information? Does that include data that is not reliable or has been obtained using bad science?

⁴ See Page 10 of U.S. EPA Decision Document for the Partial Approval/Partial Disapproval of Indiana’s 2010 303(d) List (Category 5 of the Integrated Report) (May 8, 2013) (“EPA Decision Document”).

⁵ See Page 1 of Use of Derived Criteria as Basis for Establishment of Total Maximum Daily Loads (“TMDLs”) and Listing of Impaired Waters Under CWA Section 303(d), Department of Environmental Management Office Memorandum from D. R. Joest to T. W. Easterly, March 4, 2010.

⁶ See EPA Decision Document at Page 21.

⁷ *Id.* at Pages 21-22.

⁸ EPA’s flawed derived criteria approach also applies to the metal manganese.

⁹ See EPA Decision Document at Page 22.

¹⁰ *Id.*

The difference between using dissolved metal versus total recoverable metals can be more than two orders of magnitude. Therefore, using total recoverable metals would distort the picture. Listing a stream based on total recoverable metals (e.g., iron) could be a tremendous waste of resources and time that the State could ill-afford. Using iron as an example, iron is affected heavily by suspended solids, which is affected by multiple land uses. Why would EPA not want to get a true idea of whether a metal concentration is toxic or not? Why would EPA put the State in a position to list streams that are not actually impaired?

In its Decision Document, EPA summarizes that it recommended “several options” to IDEM for comparing total recoverable metals data to water quality standards to make listing decisions.¹¹ EPA actually recommended three options, the first two of which EPA does not bother to discuss in its Decision Document thus apparently agreeing with IDEM that they are inappropriate approaches.¹² EPA’s first suggestion was that IDEM could compare total recoverable metals data directly to dissolved metals criteria (i.e., assuming that all metal present is dissolved). Based on available data, this is not a realistic assumption. EPA next suggested IDEM could compare stream total recoverable data directly to total recoverable criteria since Indiana’s water quality standards include both total recoverable and dissolved metal criteria. For iron and aluminum there are no downstate criteria, neither dissolved nor total.

EPA’s third suggestion was that IDEM could use a translator to estimate the dissolved fraction of total recoverable metals. EPA does at least take the opportunity to allege that the metal translator approach is appropriate because it is “comparable to what IDEM does in setting NPDES permit limits.”¹³ EPA’s translator suggestion includes the following language: “One approach, which could be taken without collecting additional data, is to apply the same conversion factors used to calculate dissolved criteria from total recoverable criteria in 327 IAC 2-1-6 in order to estimate the dissolved metal concentration based upon total recoverable data.”¹⁴

First, as already stated in the derived criteria comments above, setting NPDES permit limits is not the same as listing waters on a 303(d) list. Second, EPA does not seem to understand the appropriate use of the conversion factor. A prior IDEM letter to EPA citing June 1996 EPA guidance is on point: “Because of the (typically) great differences between chemical properties of effluents, the chemical properties of the receiving waters, and the chemical properties of the waters used in the toxicity tests, there is no reason to expect that ...conversion factors can be used to estimate... the fraction of metal that would be in the dissolved phase in the receiving waters...”¹⁵ The ICC agrees with IDEM’s position that “none of EPA’s suggested approaches for using existing total recoverable metals data to list waters based on metals would be appropriate.”¹⁶

¹¹ *Id.*

¹² See Letter from David R. Joest, Assistant Commissioner of the Office of Legal Counsel and Criminal Investigations at IDEM, to Peter Swenson, Chief of Watersheds and Wetlands Branch at U.S. EPA, dated September 12, 2011 (“September 12, 2011 Joest letter”).

¹³ See EPA Decision Document at Page 22.

¹⁴ See Letter from Peter Swenson, Chief of Watersheds and Wetlands Branch at U.S. EPA, to Marylou Poppa Renshaw, Chief of Watershed Assessment and Planning Branch at IDEM, dated June 30, 2011.

¹⁵ See September 12, 2011 Joest letter, citing to Page 5 of *The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit From A Dissolved Criterion* (EPA June 1996).

¹⁶ See September 12, 2011 Joest letter.

Dissolved metals are more representative of what is toxic than total recoverable metals, as EPA agrees. EPA cannot do a translator without the dissolved fraction. The fraction is not the same for every stream. These are site-specific issues. Data must be collected to show that a translator actually works.

3. Other technical issues and considerations.

Much of the criticisms in the Technical Analysis set forth in the ICC's comments and related Attachments dated February 26, 2010 to IDEM on its draft 2010 list of impaired waters are applicable to the rationale EPA has now used to partially disapprove IDEM's 2010 Indiana 303(d) list.

The irony with EPA's partial disapproval is that the decision-making is in direct conflict with Administrator Jackson's May 9, 2009 memorandum to all EPA employees on scientific integrity. From Administrator Jackson's memo:

The public health and environmental laws that Congress enacted depend on rigorous adherence to the best available science. ... Science must be the compass guiding our environmental protection decisions. We cannot make the best decisions unless we have confidence in the integrity of the science on which we rely. Therefore, it is my promise that scientific integrity will be the backbone of my leadership of the Agency.¹⁷

As pointed out above, EPA's disapproval does not adhere to the best available science.

Advancements in science have led to better standards. The ICC asks whether EPA has looked at water quality standards approved for iron and aluminum in other states, and if these approved standards are comparable to the derived number that the agency is now trying to impose on Indiana. For example, advancements have been made and standards have been approved by EPA in both Colorado and New Mexico, where aluminum is based on hardness and filtration methods have been used to obtain a more accurate iron number. Has EPA compared its approval of these standards in Colorado and New Mexico to the rationale it is now trying to impose on Indiana? Irrespective of administrative arguments or questions about the substance of Indiana state processes, new methods being developed warrant consideration. Getting the science correct should be the main focus. This type of approach would adhere to the spirit of Administrator Jackson's profound words.

Conclusion

Simply put, in 2011 EPA asked IDEM to justify IDEM's revised approach to using derived criteria and total recoverable metals as a basis for listing waters as impaired. IDEM subsequently justified its revised approach. EPA then effectively disregarded IDEM's justification. EPA is not in a better position than IDEM to interpret Indiana regulatory and

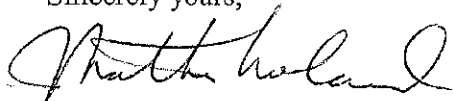
¹⁷ See *Scientific Integrity: Our Compass for Environmental Protection*, Memorandum from Lisa P. Jackson, Administrator, to All EPA Employees, May 9, 2009.

statutory language. For EPA to ignore IDEM's proper interpretation of its own state regulations and laws defies the principles of cooperative federalism. Clearly, EPA should not have partially disapproved of IDEM's position and proposed additions to the 2010 Indiana 303(d) list based on its erroneous beliefs relating to the derived criteria and total recoverable metals issues the ICC has discussed in this letter.

The ICC respectfully requests EPA to revise its listing determination by deleting Table 12 of Appendix A1 of its Decision Document dated May 8, 2013. The ICC trusts that IDEM is doing as it promised and has been working "to collect additional data that will allow for adequate assessments based on established water quality standards for dissolved metals."¹⁸ Any attempt by EPA to disrupt the procedures to be afforded the public and regulated entities, which EPA appears to have done in using flawed reasoning to partially disapprove the 2010 Indiana 303(d) list, is unconstitutional, arbitrary and capricious, an abuse of discretion, and contrary to the federal Clean Water Act and Indiana law.

Should EPA choose to follow the directives of Executive Orders 12866 and 13563, it would give the ICC time to elaborate further on EPA's flawed legal and technical approach. If you have any questions regarding any of our comments, please contact me at (317) 638-6997 or admin@indianacoal.com. Thank you for the opportunity to comment on EPA's proposed decision relating to the 2010 Indiana 303(d) list.

Sincerely yours,



J. Nathan Noland
President

¹⁸ See September 12, 2011 Joest letter.

Nat Noland

From: Microsoft Outlook
To: rivera-carrero.vilma@epa.com
Sent: Wednesday, July 17, 2013 1:55 PM
Subject: Undeliverable: Proposed Listing of Additional Waters To Be Included on Indiana's Section 303(d) List Comments

Delivery has failed to these recipients or groups:

rivera-carrero.vilma@epa.com (rivera-carrero.vilma@epa.com)

The server has tried to deliver this message, without success, and has stopped trying. Please try sending this message again. If the problem continues, contact your helpdesk.

Diagnostic information for administrators:

Generating server: BN1PR05MB235.namprd05.prod.outlook.com
Receiving server: na01.map.protection.outlook.com (207.46.163.215)

rivera-carrero.vilma@epa.com

7/17/2013 5:55:00 PM - Remote Server at na01.map.protection.outlook.com (207.46.163.215) returned '550 4.4.7 QUEUE.Expired; message expired'

7/17/2013 5:44:55 PM - Remote Server at na01.map.protection.outlook.com (207.46.163.215) returned '450 4.7.0 Proxy session setup failed on Frontend with '451 4.4.0 DNS query failed. The error was: DNS query failed with error InfoNoRecords''

Original message headers:

Received: from BN1PR05MB235.namprd05.prod.outlook.com (10.255.206.13) by BN1PR05MB235.namprd05.prod.outlook.com (10.255.206.13) with Microsoft SMTP Server (TLS) id 15.0.731.16; Mon, 15 Jul 2013 17:54:03 +0000
Received: from BN1PR05MB235.namprd05.prod.outlook.com ([169.254.9.172]) by BN1PR05MB235.namprd05.prod.outlook.com ([169.254.9.172]) with mapi id 15.00.0731.000; Mon, 15 Jul 2013 17:54:03 +0000
From: Nat Noland <admin@indianacoal.com>
To: "rivera-carrero.vilma@epa.com" <rivera-carrero.vilma@epa.com>
Subject: Proposed Listing of Additional Waters To Be Included on Indiana's Section 303(d) List Comments
Thread-Topic: Proposed Listing of Additional Waters To Be Included on Indiana's Section 303(d) List Comments
Thread-Index: Ac6BhC8+8MINwKKFQj6vd97j2RVc0A==
Date: Mon, 15 Jul 2013 17:54:02 +0000
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Accept-Language: en-US
Content-Language: en-US
X-MS-Has-Attach: yes
X-MS-TNEF-Correlator:

Nat Noland

From: Microsoft Outlook
To: rivera-carrero.vilma@epa.com
Sent: Saturday, July 20, 2013 11:55 AM
Subject: Undeliverable: Proposed Listing of Additonal Waters To Be Included on Indiana's Section 303(d) List Comments

Delivery has failed to these recipients or groups:

rivera-carrero.vilma@epa.com (rivera-carrero.vilma@epa.com)

The server has tried to deliver this message, without success, and has stopped trying. Please try sending this message again. If the problem continues, contact your helpdesk.

Diagnostic information for administrators:

Generating server: BN1PR05MB235.namprd05.prod.outlook.com
Receiving server: na01.map.protection.outlook.com (207.46.163.247)

rivera-carrero.vilma@epa.com

7/20/2013 3:54:31 PM - Remote Server at na01.map.protection.outlook.com (207.46.163.247) returned '550 4.4.7 QUEUE.Expired; message expired'

7/20/2013 3:44:31 PM - Remote Server at na01.map.protection.outlook.com (207.46.163.247) returned '450 4.7.0 Proxy session setup failed on Frontend with '451 4.4.0 DNS query failed. The error was: DNS query failed with error InfoNoRecords''

Original message headers:

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Received: from BN1PR05MB235.namprd05.prod.outlook.com ([169.254.9.172]) by BN1PR05MB235.namprd05.prod.outlook.com ([169.254.9.172]) with mapi id 15.00.0731.000; Thu, 18 Jul 2013 15:54:26 +0000

From: Nat Noland <admin@indianacoal.com>

To: "rivera-carrero.vilma@epa.com" <rivera-carrero.vilma@epa.com>

Subject: Proposed Listing of Additonal Waters To Be Included on Indiana's Section 303(d) List Comments

Thread-Topic: Proposed Listing of Additonal Waters To Be Included on Indiana's Section 303(d) List Comments

Thread-Index: Ac6BhC8+8MINwKKFQi6vd97j2RVc0ACSuG2w

Importance: high

X-Priority: 1

Date: Thu, 18 Jul 2013 15:54:25 +0000

Message-ID: <6732300639ec400a8179b3d76b8635c7@BN1PR05MB235.namprd05.prod.outlook.com>

Accept-Language: en-US

Content-Language: en-US

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Nat Noland

From: Nat Noland
Sent: Thursday, July 18, 2013 11:56 AM
To: 'rivera-carrero.vilma@epa.com'
Subject: Proposed Listing of Additional Waters To Be Included on Indiana's Section 303(d) List Comments
Attachments: 20130715135525.pdf; 20130718115919.pdf
Importance: High

These comments were forwarded to you on July 15, 2013, but as can be seen by the second attachment the delivery via Email failed. Please see the comments of the ICC in the first attachment.

Nat Noland
Indiana Coal Council, Inc.
317-638-6997

From: Nat Noland
Sent: Monday, July 15, 2013 1:56 PM
To: 'rivera-carrero.vilma@epa.com'
Subject: Proposed Listing of Additional Waters To Be Included on Indiana's Section 303(d) List Comments

Please find attached the Indiana Coal Council, Inc. comments related to the above-referenced matter.

Nat Noland
Indiana Coal Council, Inc.
317-638-6997

RECEIVED

BY *WRC*

DATE

7/24/2013